

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOAN L. PHUNG,
Appellant,
vs.
THU-LE DOAN,
Respondent.

No. 69030

FILED

DEC 20 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a district court post-judgment order granting a motion to enforce a settlement agreement in an action for divorce. Eighth Judicial District Court, Family Court Division, Clark County; Sandra L. Pomrenze, Judge.¹

After an evidentiary hearing, the district court granted respondent Thu-Le Doan's (Thu-Le) motion to enforce a stipulated settlement agreement, which resolved post-divorce issues.² On appeal, Doan L. Phung (Phung) argues: (1) the district court clearly erred by finding that Phung assented to the terms of the settlement agreement,³

¹Phung previously argued that the family court does not have jurisdiction over this matter because it involves the distribution of corporate assets. We hold that family court has jurisdiction over this case. *See Landreth v. Malik*, 127 Nev. 175, 177, 251 P.3d 163, 164 (2011) (holding "all judges in the family court division are district court judges with authority to preside over matters outside the family court division's jurisdiction.").

²We do not recount the facts except as necessary to our disposition.

³We conclude that Phung's argument concerning mutual assent lacks merit. Phung relies upon his own testimony, which the district court

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and (2) the district court abused its discretion by enforcing the settlement agreement because the agreement did not comply with District Court Rule (DCR) 16, (3) by ordering a daily penalty to ensure compliance with its order, and (4) by awarding Thu-Le attorney fees and costs.⁴

Compliance with DCR 16

We review an order enforcing a settlement agreement for abuse of discretion. *See Grisham v. Grisham*, 128 Nev. 679, 686, 289 P.3d 230, 235 (2012) (holding that the power to implement a settlement agreement is appropriate for deferential review).

Although DCR 16 requires stipulations to be reduced to writing, the purpose of the rule is to provide the court an “efficient method for determining genuine settlements and enforcing them.” *Resnick v.*

...continued

found not credible, to argue that he was unaware of the majority of the settlement terms. Moreover, Phung’s testimony was contradicted by the testimony of two of his lawyers who were present during the mediation. Both attorneys testified that Phung was aware of, and agreed to, every term in the settlement agreement. Furthermore, Phung argues that there was not a full and complete settlement, but fails to identify a single term that he believes is missing. Accordingly, the district court did not clearly err in determining that a contract based upon mutual assent existed. *See May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005) (“the question of whether a contract exists is one of fact, requiring this court to defer to the district court’s findings unless they are clearly erroneous”).

⁴We conclude that the district court abused its discretion by awarding Thu-Le attorney fees because it failed to identify the legal basis for the award or determine if the fee award was reasonable. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). Further, district courts must consider the factors established in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), before awarding attorney fees. *See id.* Therefore, we reverse this portion of the district court’s order and remand for further proceedings consistent with this order.

Valente, 97 Nev. 615, 616, 637 P.2d 1205, 1206 (1981) (applying DCR 24, later renumbered DCR 16). As the *Resnick* court noted, compliance with the rule avoids trial by affidavit or judgments entered after summary proceedings. *Id.* at 617, 637 P.2d at 1206. And by allowing district courts to award judgments after conducting an evidentiary hearing, the courts are able to award judgments based on the parties' contract. *Id.*

Here, the district court was presented with a signed stipulation announcing the parties had reached an agreement. At the evidentiary hearing, Phung's own attorneys testified that a full and complete settlement agreement had been reached. The terms of the agreement were reflected in mediation notes, prepared by both parties. Finally, the court heard evidence that, but for a scheduling conflict, the mediator would have prepared a written memorandum, and that the memorandum would have been immediately signed by both parties. Accordingly, this was not trial by affidavit nor was it a situation where judgment was entered summarily on a mere motion. Therefore, the signed stipulation, when combined with the evidence admitted at the hearing, satisfies DCR 16 and the district court did not abuse its discretion by enforcing the settlement agreement under the particular circumstances of this case.⁵

⁵We caution that this order does not loosen or ignore the requirements of DCR 16 as Thu-Le presented a signed stipulation announcing the agreement. Instead our conclusion is based upon the facts that appear before us on this record and our conclusion is limited to these facts.

*Contingent daily penalty*⁶

This court reviews the imposition of sanctions for abuse of discretion. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). “Even if we would not have imposed such sanctions in the first instance, we will not substitute our judgment for that of the district court.” *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). A court may impose upon a party any and all sanctions that are reasonable when a party “[f]ails to comply with any order of a judge of the court.” EDCR 7.60(b)(5). An imposed sanction must be proportionate to a litigant’s misconduct. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 681, 263 P.3d 224, 230 (2011) (quoting *Heinle v. Heinle*, 777 N.W.2d 590, 602 (N.D. 2010)).


Here, following a hearing, the district court ordered that should Phung fail to pay the settlement amount by October 31, 2015, a daily penalty of \$1,000.00 would attach to the settlement amount in lieu of interest. The record supports the district court’s conclusion that Phung has continuously, and unnecessarily, prolonged the litigation for nearly two years. Further, a review of the district court’s oral order reveals that the court was justifiably concerned that Phung would not comply with its order and pay Thu-Le. Therefore, we conclude that the district court did

⁶We have considered Phung’s argument that the daily penalty is not a sanction, but instead an award of punitive damages. However, we conclude that because the penalty applies only if Phung fails to comply with a court order, it is properly construed as a contingent sanction. See EDCR 7.60(b)(5) (providing that a court may impose sanctions if a party fails to comply with a court order). We caution the district courts to avoid confusion by identifying the legal authority applied when a sanction is imposed.

not abuse its discretion by ordering the daily penalty as a contingent sanction to ensure compliance.⁷ Accordingly we,

ORDER the judgment of the district court affirmed in part and reversed in part, and we remand this matter for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao

SILVER, J., dissenting:

Despite the unique circumstances of this case, I believe this court is constrained to reverse the district court's order enforcing a settlement agreement that failed to comply with the requisite statutory provisions. Therefore, I respectfully dissent.

Under DCR 16, an agreement to settle can be enforced by motion if "the agreement is either...reduced to a signed writing or...entered in the court minutes following a stipulation." *Grisham v. Grisham*, 128 Nev. 679, 683, 289 P.3d 230, 233 (2012) (internal quotations omitted) (citation omitted). Even when there is an actual agreement, a court may not consider the agreement when "it was neither reduced to a signed writing nor entered by consent as an order." *Humana, Inc. v. Nguyen*, 102 Nev. 507, 509, 728 P.2d 816, 817 (1986).

⁷We have considered all other arguments and conclude that they are unpersuasive.

In this case, although Phung may have orally agreed to the settlement terms at the mediation, neither he nor his counsel signed the mediation notes, which contained the settlement terms. Additionally, the signed stipulation vacating the evidentiary hearing dates did not contain any settlement terms, let alone the essential terms. Furthermore, the stipulation failed to incorporate by reference any document that did contain the terms, and instead merely stated that the parties would submit a separate order containing the terms-an event which never occurred.

As the district court may not consider a settlement agreement unless it was reduced to a signed writing or entered by consent in the minutes, or as an order, I believe this court should conclude the district court abused its discretion in granting Thu-Le's motion to enforce the oral settlement agreement in this case. I, therefore, respectfully dissent.


_____, J.
Silver

cc: Hon. Sandra L. Pomrenze, District Judge, Family Court Division
Ara H. Shirinian, Settlement Judge
L. Joe Coppedge
Willick Law Group
Eighth District Court Clerk